



# THE HORTICULTURAL CONSULTANT IN COURT

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*The following information is excerpted from Mr. Scott's presentation before the American Society of Consulting Arborists in St. Petersburg, recently. It offers some down-to-earth advice on how the consultant can protect his interests when called to testify in court.*

**T**he subject which has been assigned to me is really of too great a magnitude to be discussed in the time allotted. However, we will try to acquaint you with some of our experiences and methods under which we have operated in the horticultural consulting business in Canada (and some in the United States,

the Orient, and Europe) since 1959.

At that time we entered into this brand new profession — more by accident, than by design. Permit me to explain — after we sold one of the largest and most successful nursery operations in Canada in 1959, (at the age of 47) we were faced with the problem of inactivity.

While we owned and operated the nursery, we used to be approached and sometimes subpoenaed by lawyers who had knowledge of our experience and qualifications in the field of horticulture — and who needed advice and expert testimony on behalf of their clients. So — with this in mind — and with the encouragement from a number of people for whom we had con-

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sulted — we struck out into this new profession on a full time basis.

What I have to say today here could apply to you — even if you are confining your efforts strictly to trees. Let me emphasize very strongly that we do not go out of the realm of horticulture. Nor do we venture into such fields as forestry. If we do not know — we say so. I learned this principle at Ohio State University under Dr. Chadwick many years ago. It has stood me in good stead. I think one of your former Presidents of the U.S.A. — Mr. Truman made a statement that could very well apply to our profession. He is reported to have said that “It is what you learn after you know it all — that really counts”.

You say to me how can you have knowledge of all subjects that you refer to in horticulture. WE DON'T — but, we do know the people who have the required knowledge. I am the first to admit that my knowledge is limited, but I do know where to find the people who have the required specific answers; — and who are willing to put their findings or opinions into writing — and most important (if required) testify accordingly.

How do we operate? Very simply — with little or no fan fare. We have never had to advertise. One client has told another. We are listed in the yellow pages of the telephone directory — and continue to be listed in Toronto — although we moved to Stratford (100 miles west of Toronto) two years ago.

We do not maintain or keep up a separate office. We do business from our residence. When we first started in Toronto in 1959 we thought we had to have a separate downtown office and a full time secretary. We have been able to do all our work from home with a part time typist — but always have someone at our place of business to answer the telephone because most of our contacts are by telephone. We learned a long time ago that it wasn't how much cash you took in — but — what you did with that cash that gave the final desirable financial result.

The past 18 years in the consulting business have been good to us. It is no side line or part time business with us. Let it be known that yours is a full time business — and your profession will be recognized much better in your community.

Do not humble yourself to lawyers — or others who would put words into your mouth. When this happens to us we simply ask the lawyer who is going to write the report, and who is going to testify? We make it very clear that if he wishes to engage us that it will be our report based on our findings and our evaluation of the situation.

We have had a few lawyers tell us that our fee was too steep. We simply tell them that if they knew what we or our team knows — they would not be needing us. It clears the air once and for all — and the few who might cause you any problem soon realize that your experience — your education — your ability is to be recognized on a professional basis.

We charge \$300 per working day or part thereof. We have paid some of our team as high as \$500 per day on a big problem. We give no estimate or quote for a job — except per diem — but do include an upset figure where required.

Our working day includes travelling time from portal to portal. Mileage (presently 25¢ per mile) is extra — as is any out of pocket expense such as lodging, meals, etc. This business will never lend itself to mass production. You can make a good living — but you will never get rich. There is considerable lost time which you must allow for.

It is generally a one man operation, using all part time assistance as required. Your most valuable asset is your reputation. You cannot deviate from the straight and narrow. Never try to create value. On the other hand a tree or shrub is always worth something — even a nominal value of \$1.00 to the owner. Always recognize that everything is worth something to the owner. So long as you recognize some value then it becomes a matter of judgment as to how much.

We do not discuss a new problem with an adjuster or lawyer by

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telephone until we get a letter stating that we are employed — otherwise you are milked and your knowledge is used for free. There are a lot of chiselers in this world. When a prospective client calls, we try to be as courteous as possible but very soon ask if they wish to engage us. We acquaint them with the nature of our profession and our fee. If they do not answer that we are to be engaged the conversation stops.

When we get an assignment — (say from a government agency) we go to the assigned property. Before we get there we have someone from that agency acquaint the person who is affected that we will be calling at their place — and what we will be doing.

When we arrive we first make ourselves acquainted with the affected person. We present our business card and any letter that we may have from the authorizing body to assure the affected who we are and what we do. We also take time to assure the affected that our work is strictly on an unbiased basis — and that the results as documented in our report will be exactly the same had we done the work for them personally. This procedure has paid dividends. Another important point to remember is the boundaries of the area affected. We do not attempt to ascertain this from plans or blueprints — but have someone from the person or firm who is engaging us point out to us the definite boundaries. In this way we overcome a possible problem of wrong identification of area in court.

Our report incorporates the statement that we examined the plants on the area as pointed out to us by so and so. This means that if any controversy arises re the area boundaries, he or they must answer, not us. We give no advance information or guess about our report, either to our client or the affected party. Our written report contains all and only that with which we wish to be credited.

Our reports are of good and professional appearance and sufficiently presentable under any cir-

cumstances. Facts are closely checked. Reports are always submitted in triplicate to the client with an extra copy for our files. Keep your copy on file. We have been called to court on work which we had completed 4 and 5 years ago. Our report says only that to which we can testify. We make no guesses. We calculate everything in some explainable manner.

Always keep your field notes and all working calculations. Always take these to court or to any meeting with your client to show how you arrived at your conclusion. Our report includes our terms of no use by others (even our clients) without our written permission. It also gives a resumé of our scholastic (or that of a member of our team) standing — our affiliated associations such as a member of the A.S.C.A. etc.

We tell what courts or tribunals in front of which we have appeared. We give a partial list of our clients whom we have or are serving. This documentation is very helpful and serves to substantiate our standing in our profession.

Be careful of the working in your report. For example in our early experience we said words to the effect that we made a "detailed" examination of such a group of trees. A leading lawyer in Toronto took me apart. What is "detailed"? Describe it! Explain in brief, a good lawyer will destroy your credibility in short order — and really as a consultant; — credibility is your most important asset. You must at all times be completely and totally unbiased.

In court; — answer only what is asked. Do not volunteer information. Answer simply but factually. Do not be swayed. If you know you are right say so — but stick with it. Dress simply and properly. The court still desires respect.

Don't get off on a tangent — nor permit the opposing lawyer to put you into that position. I sit with many of the lawyers in court cases for the cross-examination of the other horticultural witness or expert. Lawyers do not know or pretend to know our business. He doesn't know when he is getting a snow job when it comes to the

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technical side of our business. That is why he hires you.

Do not be lured out of your realm of knowledge and training. For example we are well known by many lawyers in Ontario — and some know our background. They know that at one time we owned a number of different kinds of properties — so they ask us — “how much is that land or house worth where the damaged trees are located”. We answer that we do not know — and stick with that answer. Why? because although we have a real good idea of the property value, we are not real estate appraisers. If we volunteered an answer — he would immediately ask for our real estate credentials. We have none — and so he discredits us. Say only what you know in the realm of horticulture or arboriculture.

Another word of caution. If you are a nurseryman selling plants and appear as a witness consultant you may be and generally are disqualified by the court because you have a possible conflict of interest. In other words you could sell your client new plants from your nursery — and therefore you may be accused of creating value for your client in your consultant report.

Before going to court or to a meeting with or for a client, do your homework. Review your figures — make sure. Just last November I saw an expert get an awfully red face in court. He had miscalculated. He had the decimal point in the wrong place. This shot holes in his whole testimony.

We served as a horticultural consultant for some 12 years for a large chain (350 stores — later 1000 stores across Canada) in advising them on matters pertaining to their horticultural dept. When we went to a meeting with the principals of this huge organization, we had to have our facts. They do not pay you to guess — find out — and document your findings for your meetings as these may be put into profitable action where required.

Likewise, always meet with the lawyer for your client and review

some part of the case prior to going to court. Discuss all angles. I've left court and not given my testimony on two occasions because the other consultant damaged himself beforehand and my testimony would have helped the other side — so on agreement from our lawyer, I just did not give any evidence.

You should recognize these situations and advise your lawyer accordingly. He will make the decision — but you know when the other fellow goes off the deep end — let him drown quietly. I like the court aspect. If you do not like or will not appear in court, be sure to say so — because a report without backing it up by being ready to have it thoroughly scrutinized is in my opinion more or less useless.

Take your own pictures of subject under discussion (trees, etc.) to illustrate your report. This is important. Be very observant and take lots of notes on the job. For example we were doing an assignment in Preston, Ontario, and in my examination of the trees I noticed up in an old cavity a railway spike. I noted this in my field notes and the exact tree. Sure enough, it had been “planted” — and during the court case I was asked if I saw anything unusual in any of the trees. I knew immediately that he was trying to ascertain how observant I was — or did I just make “a windshield examination”. I was able to answer re the spike and it took the wind out of the opposing lawyers sails.

There is so much to this business that has not been encountered. Only by exchanging ideas and experiences will we progress. Two things I would like to see take place: (1) Introduce horticulture consulting into our university courses as part of horticulture and (2) Change our present name from American to that of “International Society of Consulting Arborists” — because it is International and will become more so as time progresses.

In conclusion, as a tribute to the free enterprise system in our two great countries; — tell me; — in what other countries in the world (except Canada and U.S.A.) could you succeed at something that at one time was considered so far out as “Horticulture Consulting”? □

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